

MENTAL HEALTH EVALUATIONS AND THE RECORD

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Program Overview

- Part I: Law you need to know
- Part II: Evaluations and the record
- Part III: Appellate Concerns
- Part IV: Lessons from *State v. Grell*

PART I: LAW

A.R.S. 13-701(E) (Mitigating Factors)

- For the purpose of determining the sentence pursuant to subsection C of this section, the court shall consider the following mitigating circumstances:
- 1. The age of the defendant.
- 2. The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
- 3. The defendant was under unusual or substantial duress, although not to a degree that would constitute a defense to prosecution.

A.R.S. 13-701(E) (Mitigating Factors)

- 4. The degree of the defendant's participation in the crime was minor, although not so minor as to constitute a defense to prosecution.
- 5. During or immediately following the commission of the offense, the defendant complied with all duties imposed under [§§ 28-661, 28-662 and 28-663](#).
- 6. **Any other factor** that is relevant to the defendant's character or background or to the nature or circumstances of the crime and that the court finds to be **mitigating**.

Relevant Cases

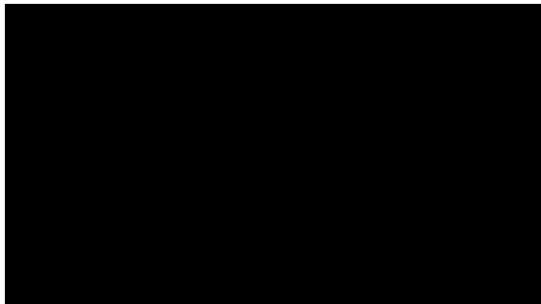
- *State v. Fish*
— 2009 WL 1879479 (Ariz. App., Div.1, June 30, 2009)
- *Clark v. Arizona*
— 548 U.S. 735 (2006)
- *Phillips v. Araneta*
— 93 P.3d 480 (Ariz. 2004)
- *State v. Johnson*
— 276 P.3d 544 (Ariz. App. 2012)

Relevant Cases

- *State v. Schackart*
 - 858 P.2d 639, 646 (Ariz. 1993) (no right to the presence of counsel during a mental health evaluation).
- *Estelle v. Smith*
 - 451 U.S. 454, 471 n. 14 (1981) (“An attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination.”)
- *State v. Grell*
 - 2013 WL 85349 (Ariz. Jan. 9, 2013)

PART II: EVALUATIONS AND THE RECORD

“Explain it to me like I’m five.”



EVALUATIONS AND THE RECORD

- Evaluations

- Working with the experts

What we like to see and working with the experts

TWO TYPES OF EVALUATIONS:

—Tests

- MMPI-2, PAI, IQ, PET, MRI, fMRI, QEEG

—Moral Culpability

What we like to see and working with the experts

TESTS

- Reliability
 - Consistency
- Validity
 - Accuracy
- Standardization
 - Representative

What we like to see and working with the experts

TESTS

- Limitations

- Very little support for using MMPI-2 to predict behavior or match individuals with prototypes

What we like to see and working with the experts

TESTS

- Limitations

-

What we like to see and working with the experts

MORAL CULPABILITY

- No particular testing
- Attempt to tie diagnosis to prior testing
- Risk factors

What we like to see and working with the experts

WORKING WITH MENTAL HEALTH EXPERTS

- Mental State at the Time of the Offense
 - Detailed review of months/weeks leading up to offense
 - Detailed review of days/hours leading up to offense
 - Detailed review of actions immediately following offense

What we like to see and working with the experts

- Emphasis on **BEHAVIOR** before
- Emphasis on **BEHAVIOR** after

What we like to see and working with the experts


- Presence or absence of mental disease/defect
- Presence or absence of relationship between mental disease/defect and criminal behavior
- Relationship between mental disease/defect, criminal behavior, and the relevant legal standard

What we like to see and working with the experts

• THE REFERRAL LETTER: WHY IS IT SO IMPORTANT?

STATE
V. NEWELL:

The
Referral
Letter


Office of the Attorney General
State of Arizona

Jeffrey A. Dick
Capital Litigation Section

November 3, 2010

Terry Goddard
Attorney General

Dr. Steven Pfo
13841 N. 17th Street
Box 100
Scottsdale, Arizona 85256-2179

RE: State v. Steven Ray Newell, CR2001-00124

Dear Dr. Pfo:

As you know, the above matter has been scheduled for an evidentiary hearing in Newell's post-conviction claim that his counsel provided ineffective assistance of counsel in advising him not to cooperate with the State's mental health experts prior to sentencing. This advice ultimately led to the trial and, as a result, Newell's mental health mitigation evidence. The post-conviction court will decide whether, given the foregoing facts, the mitigation evidence Newell presents now is sufficiently substantial to warrant further inquiry.

The State has requested that you evaluate Newell in light of his previous mental health evaluations. The following questions should be addressed in assessing Newell's mitigation evidence:

(1) Under A.R.S. § 13-710(D)(3), a first-degree murder can be mitigated if "the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a complete or permanent incapacity." The State is interested in knowing whether, in your professional judgment, Newell suffered from a mental illness or cognitive impairment that significantly impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law.

(2) Was Newell under "mental and substantial duress," at the time of the murder? See A.R.S. § 13-710(D)(2). If so, was there a causal connection between any mental or substantial duress and the mental assault and murder of the victim?

(3) Whether Newell's postulated mental condition was causally connected to the mental assault and murder of the victim? The post-conviction court will need to determine what weight to give Newell's postulated mitigation.

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STATE
V. NEWELL:

The
Referral
Letter – Cont.

Dr. Steven Pfo
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When determining what weight to give particularly mitigating factors, the court considers the quality and strength, not the quantity, of the mitigating factors and the extent to which they are supported by the evidence. Although a "mental disorder" sometimes may be a mitigating factor, it is not required, and a defendant's failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence. When evaluating Newell's mental health evidence, what, if any, causal connection is demonstrated between Newell's mental health evidence and the murder?

In addition to the above, I would like your responsive and/or criticisms of the diagnosis, evaluations, and testing done by Newell's expert witnesses.

Thank you again for your service in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,
TERRY GODDARD
Attorney General


JEFFREY A. DICK
Attorney General/General
Capital Litigation Section
602-542-4800

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What we like to see and working with the experts

• The Evaluation Process:

- Extensive Record review
 - Medical
 - Criminal/Law Enforcement
 - Correctional
- Psychiatric Interview
- Neuropsychological Assessment
- Travel to the scene

What we like to see and working with the experts

COLLATERAL DATA

Collateral Data

• Police Reports

- Scene Photos
- Audio and Video
- Transcripts

• Prior Criminal History

- Law Enforcement
- Probation/Parole
- Jail/Prison

Collateral Data

- Current Detention Records

- Medical
- Mental Health
- Classification
- Disciplinary
- Work Assignment
- Jail Phone Calls
- Visitation

Collateral Data

- Psychiatric Records

- Inpatient
- Outpatient
- Counseling

- Substance Abuse Records

- Inpatient
- Outpatient
- Counseling

Collateral Data

- Educational/School Records

- Military Record

- Employment Records

- Financial Records

Collateral Data

- Personal Records

- Journals
- Diaries
- Calendar(s)
- Photographs
- Video/Audio Recordings
- E-mail
- Other writings/Correspondence
- Social Media Pages

PART III: APPELLATE CONCERNS

APPELLATE CONCERNS

- Preclusion
- Causal nexus language
- Professionalism/Ethics

APPELLATE CONCERNS

- Preclusion (2 types)

- Where defendant waives mitigation
- State moves to preclude

APPELLATE CONCERNS

- Preclusion (cont.)

- Defendant waives mitigation
 - Place proffer on the record of any rebuttal evidence State would have presented

APPELLATE CONCERNS

- Preclusion (cont.)

- State moves to preclude proffered mitigation
 - Please, please, please try not to move to preclude mitigation evidence

APPELLATE CONCERNS

- Preclusion (cont.)

- A.R.S. § 13-752(G) (defendant may present any evidence that is *relevant* to determination that mitigation is sufficiently substantial to call for leniency)

- QEEG and mental retardation example (*State v. Smith*; *Smith v. Ryan*)

APPELLATE CONCERNS

- Causal nexus language

- The link between the proffered mitigation and the murderous conduct

- *E.g.*, *State v. Clabourne*, 983 P.2d 748, 756 (Ariz. 1999) (“Whatever the difficulty in Clabourne’s family life, he has failed to link his family background to his murderous conduct or to otherwise show how it affected his behavior.”)

APPELLATE CONCERNS

- Causal nexus language (cont.)

- *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008)

- *State v. Styers*, 254 P.3d 1132 (Ariz. 2011)

APPELLATE CONCERNS

- Causal nexus language (cont.)

- “Although we do **not** require establishment of a nexus between the mitigating factors and the crime before we consider the mitigation evidence, we may consider the failure to show such a connection as we assess ‘the quality and strength of the mitigation evidence,’ and may attribute less weight to the mitigating effect of a disorder if the defendant fails to establish a relationship between the disorder and the criminal conduct.” *Id.* at 1135.

APPELLATE CONCERNS

WHY ARE WE SO CONCERNED ABOUT PRECLUSION AND CAUSAL NEXUS LANGUAGE?

APPELLATE CONCERNS



APPELLATE CONCERNS



APPELLATE CONCERNS

- *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)
 - “[w]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, *any aspect of a defendant’s character or record* and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”

APPELLATE CONCERNS

- *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982)
 - “The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by *excluding* such evidence from their consideration.”

APPELLATE CONCERNS

- *State v. Roque*, 141 P.3d 368, 398-99 (Ariz. 2006)
- State’s argument that defendant’s low IQ did not cause him to murder cured by jury instructions directing jury to consider **all** proffered mitigation.

APPELLATE CONCERNS

- **Professionalism**
- The responsibilities of the prosecutor go beyond the duty to convict the defendant.
- The prosecutor has a duty as a “minister of justice” to “see that defendants receive a fair trial.”
- Ariz. R. Sup. Ct. 42, ER 3.8.

APPELLATE CONCERNS

- **Professionalism**
- Improper opinion as to validity of testing during cross-examination. *State v. Roque*, 141 P.3d 368, 404 (Ariz. 2006); *see also In re Zawada*, 92 P.3d 862, 869-70 (Ariz. 2004).
- Harrassment
 - ER 3.4(e) requires that questioning have some factual basis.

APPELLATE CONCERNS

- Professionalism

- Non-disclosure of scope of testimony

- Cured by having a referral letter detailing the scope of your expert's opinion

PART IV: LESSONS FROM GRELL

LESSONS FROM *GRELL*

- 3 quick observations relating to mental evaluations:

- Choosing the right expert
 - Focus the expert on the task at hand
 - Appropriate testing

LESSONS FROM *GRELL*

- Choose to appropriate expert

– “The State’s sole mental retardation expert throughout these proceedings has been Dr. Scialli, a board certified psychiatrist. He does *not* diagnose, treat, or educate those with mental retardation.” 2013 WL 85349 at *6.

LESSONS FROM *GRELL*

- Choose the appropriate expert (cont.)

– “And unlike [the defense experts], who have both published extensively concerning mental retardation in peer-reviewed journals, Dr. Scialli has never published a peer-reviewed article on mental retardation.” *Id.* at * 7.

LESSONS FROM *GRELL*

- Focus the expert on the task at hand

– MR/ID diagnosis focused on functioning prior to age 18. A.R.S. § 13-753(K)(3)

LESSONS FROM GRELL

- Appropriate Testing

- “Fourth, the MMPI-2 test upon which Dr. Scialli relied was unreliable. The record suggests that Grell might not have had adequate time or lacked the intellectual functioning to comprehend the test. To overcome this deficit, the administrator read the questions to Grell, even though subjects are supposed to take the test on their own.” *Id.* at *7.

LESSONS FROM GRELL

- Appropriate Testing

- Vineland Adaptive Behavior Scale completed when Grell was approximately nine years old.
- Court afforded this test little weight because not administered appropriately. *Id.* at *5 (Grell’s mother inappropriately handed the test to fill out herself likely affecting the validity)

LESSONS FROM GRELL

- Appropriate Testing

- “The State conducted an adult version of the Vineland, which showed that Grell had average adaptive skills for someone his age, but the test was administered to the victim’s family who had never met Grell before he turned eighteen and might have harbored ill feelings toward him.” *Id.* at *10, n.5.

OTHER LESSONS FROM *GRELL*

- Mental retardation is now known as “intellectual disability.”
 - 2011 Ariz. Sess. Laws, ch. 89, § 5 (1st Reg. Sess.).
- What is the standard of proof for intellectual disability?
 - Clear and convincing?
 - Preponderance of the evidence?

OTHER LESSONS FROM *GRELL*

- STANDARDS
 - PRETRIAL - CLEAR AND CONVINCING
 - A.R.S. § 13-753(G)
 - PENALTY PHASE – PREPONDERANCE?
 - § 13-753 does not require either the trial court or jury to find intellectual disability as a bar to execution

OTHER LESSONS FROM *GRELL*

- Standards
 - “Yet the Court’s decision today recognizes that a finding of mental retardation by a *preponderance* precludes a death sentence.” *Id.* at *10 (Bales, J., concurring).
 - “In cases not subject to independent review, courts will need to address how to assure that a fact finder considers whether a defendant has proved mental retardation by a *preponderance standard*.” *Id.*

QUESTIONS/DISCUSSION

?????
